

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

MYRNA SANCHEZ AND
JUAN SANCHEZ,

Plaintiffs,

v.

KEITH D. BOYKIN,

Defendant.

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C.A. No. 07C-07-161 WCC

Submitted: January 26, 2010

Decided: March 11, 2010

MEMORANDUM OPINION

**Upon Defendant's Motion for Costs - DENIED
Upon Plaintiffs' Counter-Motion for Costs - DENIED**

Bernard J. McFadden, Esquire; Green, Green, Godowsky & McFadden, 1200
Pennsylvania Avenue, Suite 303, Wilmington, DE 19806. Attorney for Plaintiffs.

James J. Haley, Jr., Esquire; Ferrara & Haley, 1716 Wawaset Street, P.O. Box 188,
Wilmington, DE 19899-0188. Attorney for Defendant.

CARPENTER, J.

A. PROCEDURAL HISTORY

On July 18, 2007, Mr. Juan Sanchez and Mrs. Myrna Sanchez (“Plaintiffs”) filed a complaint against Mr. Keith Boykin (“Defendant”) for injuries allegedly arising out of an automobile accident. On April 15, 2009, Defendant served an offer of judgment on Plaintiffs in the amount of \$10,000. Plaintiffs did not accept the offer and the parties proceeded to trial. A jury trial was held on August 31 to September 2, 2009 to resolve the issue of damages as to both Plaintiffs. On September 2, 2009, the jury returned a verdict and awarded no damages to both Plaintiffs.

Plaintiffs then filed a Motion for a New Trial and/or Additur. On December 30, 2009, the Superior Court awarded an additur to Mrs. Myrna Sanchez in the amount of \$6,000 based on uncontradicted medical testimony presented at trial.¹

Defendant then filed this Motion for Costs Pursuant to Superior Court Civil Rule 68. Plaintiffs filed an Opposition to Defendant’s Motion for Costs Pursuant to Rule 68 and asserted a Counter-Motion for Costs Pursuant to Rule 54.

B. DEFENDANT’S MOTION FOR COSTS PURSUANT TO SUPERIOR COURT CIVIL RULE 68

Superior Court Civil Rule 68 provides that where a timely offer of judgment is not accepted prior to trial and “the judgment finally obtained by the offeree is

¹ *Sanchez v. Boykin*, No. 07C-07-161 WCC (Dec. 30, 2009).

not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” Rule 68 only applies if the adverse party obtains a judgment that is “not more favorable” than the offer.² However, if Rule 68 does apply, an award of costs is mandatory.³

(a) Mr. Sanchez

This Court has previously ruled that when the jury fails to award damages to a Plaintiff, the Defendant has not obtained a judgment that would activate the requirement of Rule 68.⁴ At trial, the jury returned a verdict of zero dollars for Mr. Sanchez and the verdict was also left undisturbed by this Court’s December 30, 2009 opinion. Therefore, Rule 68 does not apply to Mr. Sanchez .

(b) Mrs. Sanchez

The issue then becomes whether the Defendant’s offer of judgment is effective as against Mrs. Sanchez. Defendant’s offer of judgment read as follows: “Defendant Keith D. Boykin hereby permits judgment to be entered against him and in favor of the Plaintiffs, Myrna Sanchez and Juan Sanchez, in the amount of \$10,000.00 plus costs incurred to date.”

Although Defendant’s offer of judgment is timely, the offer is unenforceable under Rule 68. It is well settled law that an award of costs under Rule 68 is only available when the offer has been formally apportioned individually to each

² *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 509 (Del. 2001).

³ *Beaudet v. Thomas*, 797 A.2d 678 (citing *Hercules, Inc.*, 784 A.2d at 509).

⁴ *See Flood v. Riley*, 2002 WL 32067553, at *1 (Del. Super. Dec. 31, 2002).

Plaintiff in cases involving more than one party.⁵ This is because without a clear individualized assessment of the offer amount as to each plaintiff, it is not possible for the Court to determine whether the judgment obtained is more favorable as to that plaintiff.⁶

Defendant's offer of judgment makes a collective offer to Mr. and Mrs. Sanchez and thus fails to separate the amounts offered to each of them individually. Under such circumstances, this Court will decline to presume the amounts offered to each of the Plaintiffs and will deny the Motion for Costs.

**C. PLAINTIFFS' COUNTER-MOTION FOR COSTS PURSUANT TO
SUPERIOR COURT CIVIL RULE 54**

In their Opposition to Defendant's Motion For Costs, Plaintiffs bring a Counter-Motion for Costs Pursuant to Rule 54(d) and (h). Superior Court Civil Rule 54(d) states: "...costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs." This Court entered a final judgment on December 30, 2009. Therefore, under Rule 54(d), Plaintiffs' Motion must have been filed no later than January 14, 2010.⁷ Plaintiffs' Motion was filed on January 19, 2010, 5 days after the deadline imposed by Rule 54(d). As such, Plaintiffs'

⁵ *Cahall v. Thomas*, 906 A.2d 24, 27 (Del. 2006).

⁶ *Flood*, 2002 WL 32067553, at *1.

⁷ Court excluded Friday, January 1, 2010 as part of the 10 days.

Motion is untimely and since there has been no showing of excusable neglect under Rule 6(b), the entire Motion must be denied.

CONCLUSION

Based upon the above, the Defendant's and Plaintiffs' Motions for Costs are DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.